

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
KVMD Acquisition Corporation)	
)	
v.)	CSR 5765-M
)	
Echostar Communications Corporation)	
)	
Request for Mandatory Carriage of)	
Television Station KVMD(TV),)	
Twenty Nine Palms, California)	

MEMORANDUM OPINION AND ORDER

Adopted: February 11, 2002

Released: February 13, 2002

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. KVMD Acquisition Corporation, licensee of commercial television station KVMD(TV), Twenty Nine Palms, California, (“KVMD”) filed the above-captioned must carry complaint against Echostar Communications Corporation, pursuant to Section 338 of the Communications Act of 1934, as amended (the “Act”), and Section 76.66 of the Commission’s rules¹ for its refusal to carry the signal of KVMD on its satellite system.² KVMD states that Echostar is providing “local-into-local” satellite service in the Los Angeles, California market, which is the designated market area (“DMA”) where station KVMD operates, pursuant to the statutory copyright license.³ In its complaint, KVMD alleges that Echostar has failed to meet its must carry obligations under the Commission’s satellite broadcast signal carriage rules. KVMD requests that the Commission order Echostar to carry the station’s signal on Echostar’s satellite system. Echostar filed an opposition to the complaint and KVMD filed a reply.⁴ For

¹ 47 C.F.R. § 76.66. We note that on December 7, 2001, the U.S. Court of Appeals for the Fourth Circuit unanimously upheld the constitutionality of Section 338 of the Act, and Section 76.66 of the Commission’s rules. *See SBCA v. FCC*, Nos. 01-1151, 01-1271, 01-1272 and 01-1818, 2001 WL 1557809 (4th Cir. Dec. 7, 2001).

² *See* Public Notice, Special Relief and Show Cause Petitions, Report No. 0016, dated October 15, 2001.

³ *See* 17 U.S.C. § 122(a); 47 U.S.C. § 339. A satellite carrier provides “local-into-local” satellite service when it retransmits a local television signal back into the local market of that television station for reception by subscribers. 47 C.F.R. § 76.66(a)(6).

⁴ Under Section 76.66(m)(3) of the Commission’s rules, a local television broadcast station that disputes a response by a satellite carrier that it is in compliance with its must carry obligations may obtain review of such denial or response by filing a “complaint” with the Commission in accordance with Section 76.7. 47 C.F.R. § 76.66(m)(3). Although styled a “complaint,” a carriage complaint filed against a satellite carrier is treated by the Commission as a petition for special relief for purposes of the Commission’s pleading requirements. *See 1998 Biennial Regulatory Review: Part 76 – Cable Television Service Pleading and Complaint Rules*, 14 FCC Rcd 418 (1999). Responsive pleadings filed in this context, therefore, must comply with the requirements set forth in Section 76.7(b)(1).

the reasons set forth below, we grant KVMD's complaint.

II. BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),⁵ requires satellite carriers, by January 1, 2002, to carry on request all local television broadcast stations' signals in local markets in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license.⁶ For the initial election cycle, broadcast stations were required to notify satellite carriers by July 1, 2001, of their mandatory carriage election for carriage to commence by January 1, 2002.⁷ A station's market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.⁸ In November 2000, the Commission adopted rules to implement the provisions contained in Section 338.⁹

3. Under the Commission's broadcast signal carriage rules, each satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA that made a timely election for mandatory carriage, unless the station's programming is duplicative of the programming of another station carried by the carrier in the DMA.¹⁰ One television station's programming is generally considered duplicative of another station's if both stations simultaneously broadcast identical programming for more than 50% of the broadcast week.¹¹ If the stations' programming is duplicative, the satellite carrier may choose which duplicating signal it will carry.¹² Furthermore, under the SHVIA, a television station asserting its right to carriage is required to bear the costs associated with delivering a good quality signal to the designated local receive facility of the satellite carrier or to another facility that is acceptable to at least one-half the

⁵ See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁶ See 47 U.S.C. § 338.

⁷ See 47 C.F.R. § 76.66(c)(3); see also 76.66(c)(4) ("Except as provided for in paragraphs 76.66(d)(2) and (3), local commercial television broadcast stations shall make their retransmission consent-mandatory carriage election by October 1st of the year preceding the new cycle for all election cycles after the first election cycle.").

⁸ A DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. See 17 U.S.C. § 122(j)(2)(A)-(C); see also *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, 1934 (2000) ("DBS Must Carry Report & Order"); 47 C.F.R. § 76.66(e) ("A local market in the case of both commercial and noncommercial television stations is the designated market area in which a station is located, and (i) in the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area within the same local market; and (ii) in the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station.").

⁹ See generally *DBS Must Carry Report & Order*, 16 FCC Rcd at 1918 *et seq.* The Commission later affirmed and clarified its carriage rules. See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 (2001) ("DBS Must Carry Reconsideration Order").

¹⁰ See 47 C.F.R. § 76.66.

¹¹ See 47 C.F.R. § 76.66(h)(1) ("A satellite carrier shall not be required to carry upon request the signal of any local television broadcast station that substantially duplicates the signal of another local television broadcast station which is secondarily transmitted by the satellite carrier within the same local market, or the signals of more than one local commercial television broadcast station in a single local market that is affiliated with a particular television network unless such stations are licensed to communities in different States.").

¹² See 47 U.S.C. § 338(b)(1). See also 47 C.F.R. § 76.66(h); *DBS Must Carry Report & Order*, 16 FCC Rcd at 1949-51.

stations asserting the right to carriage in the local market.¹³ To be considered a good quality signal for satellite carriage purposes, a television station must deliver to the local receive facility of a satellite carrier either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment.¹⁴

4. Whenever a local television broadcast station believes that a satellite carrier has failed to meet its obligations under Section 338 of the Act or our implementing regulations, such station shall first notify the carrier, in writing, of the alleged failure and identify its reasons for believing that the satellite carrier has failed to comply with its obligations.¹⁵ Within 30 days after such written notification, the satellite carrier must respond in writing and comply with its obligations or state its reasons for believing that it is already doing so.¹⁶ The Commission does not require satellite carriers to conduct tests or present specific measurements to broadcasters in response to requests for mandatory carriage. At the same time, however, the satellite carrier is required to have a reasonable, good-faith basis for denying carriage and an obligation to convey that information to the broadcast station affected. As the Commission stated: "It is not consistent with the SHVIA or our rules to attempt to place the burden on the broadcast station to prove why it is entitled to carriage in the absence of a legitimate reason for questioning its eligibility."¹⁷ Specifically with respect to disputes over signal quality, a station should not be rejected for carriage unless, based on a knowledge of the facts and circumstances involved, there are engineering reasons for doubting that a good quality signal is likely to be available.¹⁸ Should a station fail to provide the required over-the-air signal quality to a satellite carrier's receive facility, it still may obtain carriage rights if "the station responds with a promise to provide or pay to provide a good quality signal in the future."¹⁹

5. If Commission action is needed, as KVMD alleges here, a broadcast station may file a complaint with the Commission within 60 days after the satellite carrier submits a final rejection of the station's carriage request.²⁰ If a satellite carrier provides no response to a must carry election, the 60 day period commences after the time for responding as required by the rule has elapsed.²¹ Below, we consider the complaint filed by KVMD.

III. POSITIONS AND DISCUSSION

6. In support of its Complaint, Station KVMD states that Echostar improperly denied KVMD's carriage request on the grounds that the station does not provide a good quality signal to

¹³ 47 C.F.R. § 76.66(g)(1). *See DBS Must Carry Report & Order*, 16 FCC Rcd at 1938-45. *See also DBS Must Carry Reconsideration Order*, 16 FCC Rcd 16568-70 (affirming previous holding that selection of an alternative receive facility is based on the vote of the majority of the stations entitled to carriage in each affected market, not just the stations actually electing mandatory carriage).

¹⁴ 47 C.F.R. § 76.66(g)(2). *See DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16559-61.

¹⁵ *See* 47 U.S.C. § 338(f)(1); *see also* 47 C.F.R. § 76.66(m)(1).

¹⁶ *See* 47 C.F.R. § 76.66(m)(2).

¹⁷ *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16574.

¹⁸ *Id.* at 16572.

¹⁹ *Id.* at 16573.

²⁰ *See* 47 C.F.R. § 76.66(m)(6); *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16574. A television station seeking a finding on the facts and a resulting determination of whether it is entitled to carriage pursuant to Section 76.66 of our rules may file a complaint with the Commission. If, however, a television station that is not being carried seeks damages or other form of monetary or injunctive relief under Section 338(a) of the Act or Section 501(f) of the Copyright Act, then the United States District Court is the exclusive forum for adjudicating the merits of its claim. *DBS Must Carry Report & Order*, 16 FCC Rcd at 1974.

²¹ *See DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16574.

Echostar's local receive facility.²² KVMD contends that it does in fact provide a good quality signal over-the-air.²³ KVMD alternatively offers that, in the event that Echostar should provide evidence supporting its position, KVMD will then provide a good quality signal by a fiber feed at its own cost.²⁴

7. In its Opposition, Echostar argues that its denial of KVMD's election request was justifiable, because the station does not deliver a good quality signal to Echostar's local receive facility.²⁵ Echostar bases its denial upon the following facts: (1) KVMD's transmitter is located approximately 90 miles from Echostar's local receive facility, and (2) a signal test performed on September 7, 2001 in the presence of a representative of KVMD was unable to detect a measurable signal for KVMD.²⁶

8. Echostar also argues that KVMD is not the type of "local" station Congress intended to protect by the "local-into-local" statutory provisions, contending that denying carriage does no violence to the statutory and policy objectives of those statutory provisions under the facts of this case. Echostar concedes that Commission satellite carriage regulations adopted the same market definitions used for determining station carriage rights on cable systems, but included no "safety valve" permitting modification of a station's market in this venue as exists for cable carriage.²⁷ Echostar claims that relief from carriage is justified in the instant case none-the-less. Echostar asserts that KVMD is not attempting to serve the core of the Los Angeles market with its signal, nor is it carried on major cable systems serving Los Angeles. It asserts further that the public's interest in receiving local stations via satellite is not compromised by denying the station satellite carriage. In support of this argument Echostar observes that KVMD is not entitled to carriage due to lack of signal strength, is licensed to a community more than one hundred miles from, and possesses only the most tenuous economic, social, political, and demographic ties to, the core of the Los Angeles television market.²⁸

9. In reply, KVMD contends that Echostar's denial of the carriage request was improper and asks that the Commission require Echostar to carry KVMD as of January 1, 2002. KVMD points out that it made an offer to provide a good quality signal by alternative means in advance of that date. KVMD asserts further that it has been in the process of making arrangements for delivery to Echostar's local receive facility of a good quality signal by fiber at its own cost.²⁹

10. The question presented in this proceeding is whether and under what conditions KVMD is entitled to have its signal carried within the Los Angeles market over the facilities of Echostar. Based on the information provided, we believe that Echostar had a reasonable basis for believing that KVMD did not deliver a good quality signal to Echostar's local receive facility. Having established a reasonable basis supporting its denial, the burden then shifted from Echostar to KVMD to "pay the costs of signal tests if necessary to prove that the signal is of good quality."³⁰ The Commission has noted that the station also "has the opportunity to improve its over-the-air signal or arrange alternative means of delivery."³¹ While KVMD failed to demonstrate that it currently delivers a good quality signal over-the-air, the station

²² Complaint at 2.

²³ *Id.*

²⁴ *Id.*; Reply at 2.

²⁵ Opposition at 2-3 and Exhibit A.

²⁶ *Id.* at 3-4.

²⁷ See 47 CFR § 76.59.

²⁸ Echostar Opposition at 4-5.

²⁹ *Id.* at 3-4.

³⁰ *DBS Must Carry Reconsideration Order*, 16 FCC Rcd 16544, at 16570-71.

³¹ *Id.*

committed to delivery of its signal via fiber.³² In light of this commitment, we conclude that KVMD is entitled to carriage. In the *DBS Must Carry Reconsideration Order* we found that, in the context of DBS carriers' commencement of mandatory carriage, 75 days is a reasonable time frame within which a satellite carrier could arrange for carriage of a station following delivery of a good quality signal from a broadcaster.³³ Accordingly, we find that KVMD is entitled to mandatory carriage on Echostar's satellite system within 75 days of delivering a good quality signal to Echostar's local receive facility.

11. We reject Echostar's argument that KVMD is not entitled to satellite carriage on the grounds that Los Angeles should not be deemed part of the station's television market. In the satellite carriage environment, with KVMD's location within the Los Angeles DMA and its commitment to provide a good quality signal by alternative means to Echostar's local receive facility established on the record, our inquiry is at an end. In the *DBS Must Carry Reconsideration Order*, the Commission found that Section 338 of the Communications Act does not permit it to change the shape of a television station market. In this regard the Commission recognized that

[T]here is no explicit provision providing the Commission with the authority to modify markets in the manner permitted under Section 614(h). Therefore, we cannot establish a market modification policy on our own motion. We note that the Senate version of the SHVIA had, at one point in time, a market modification provision.³⁴ This subsection was not adopted by Congress. Thus, any attempt by the Commission to implement a market modification regime would run counter to the express intent of Congress.³⁵

Simply put, we have no authority to effectively modify KVMD's television market, or to waive the statutory requirements, as Echostar suggests.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act, as amended, 47 U.S.C. § 338, and Section 76.66 of the Commission's rules, 47 C.F.R. § 76.66, that the must carry complaint filed by KVMD Acquisition Corp., licensee of commercial television station KVMD, Twenty Nine Palms, CA, against Echostar **IS GRANTED** to the extent indicated herein.

13. **IT IS FURTHER ORDERED** that Echostar shall commence carriage of Station KVMD's signal within 75 days from the date on which KVMD provides a good quality signal to Echostar's local receive facility.

14. This action is taken by the Deputy Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

³² Complaint at 2; Reply at 2.

³³ *Id.* at Note 198.

³⁴ See Senate amendments to H.R. 1554 (May 20, 1999) ("Section 338. Carriage of Local Television Stations by Satellite Carrier. . . .The mandatory carriage provisions of section 614 and 615 of this Act will apply in a local market no later than January 1, 2002, to satellite carriers retransmitting any television broadcast station in that local market pursuant to the compulsory license provided by section 122 of title 17, United States Code.")

³⁵ *DBS Must Carry Reconsideration Order*, at 16564.